



## **GOVERNMENT ACCOUNTABILITY OFFICE**

### **4 CFR Part 28**

#### **Personnel Appeals Board; Procedural Rules**

**AGENCY:** Government Accountability Office Personnel Appeals Board.

**ACTION:** Proposed rule.

**SUMMARY:** The Government Accountability Office Personnel Appeals Board (PAB or Board) proposes to give the PAB General Counsel authority to process certain retaliation claims that have not first undergone GAO's Equal Employment Opportunity (EEO) process, and to hold certain nondiscrimination claims in abeyance if they are related to a claim pending in GAO's EEO process. These proposed changes are in response to an internal query that brought up the need to clarify perceived ambiguities in the existing regulations. The PAB also proposes to update the definition of prohibited discrimination to be consistent with changes in nondiscrimination laws. In addition, the PAB proposes to replace gendered pronouns with gender-neutral ones to reflect current usage practices. The General Accounting Office Personnel Act of 1980 provides authority to make these changes.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Comments may be submitted by any of the following methods:

Mail: Patricia Reardon-King, Clerk of the Board, Personnel Appeals Board, U.S. Government Accountability Office, Room 1566, 441 G Street, NW., Washington, DC 20548.

E-Mail: [pab@gao.gov](mailto:pab@gao.gov).

**FOR FURTHER INFORMATION CONTACT:** Stuart Melnick, Executive Director, 202-512-3836 or Kevin Wilson, Solicitor, 202-512-7517, [pab@gao.gov](mailto:pab@gao.gov).

**SUPPLEMENTARY INFORMATION:** GAO is not subject to the Administrative Procedure Act and accordingly the Personnel Appeals Board is not required by law to seek comments before issuing a final rule. However, the Board has decided to invite interested persons to participate in this rulemaking by submitting written comments regarding the proposed revisions. Application of the Administrative Procedure Act to the GAO Personnel Appeals Board is not to be inferred from this invitation for comments.

The Board is authorized by Congress, pursuant to 31 U.S.C. 751-755, to hear and decide cases brought by GAO employees concerning various personnel matters including adverse or performance-based actions, claims of discrimination, alleged prohibited personnel practices, and labor-management relations. The Board also exercises authority over GAO's EEO process at the agency. The Board's procedural regulations applicable to GAO appear at

4 CFR parts 27 and 28. The Board is proposing to revise two sections of these regulations to ensure consistency with current law and to address a process ambiguity in the current language. The Board is also proposing to replace gendered pronouns with gender-neutral pronouns.

The Board proposes to amend section 28.95 by specifically referencing the Equal Pay Act of 1963 (29 U.S.C. 206(d)), the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff-1), and the Pregnancy Workers Fairness Act (42 U.S.C. 2000gg-1) in its definition of prohibited EEO discrimination. The addition of the reference to the Equal Pay Act of 1963 is to clarify that the prohibition on discrimination in wages on the basis of sex derives from Equal Pay Act of 1963's amendment of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

The additions of the references to the Genetic Information Nondiscrimination Act of 2008 and the Pregnancy Workers Fairness Act in paragraph (e) and new paragraph (f) of 4 CFR 28.95 reflect types of discrimination that became prohibited on the effective dates of the respective statutes but had not yet been codified into the Board's regulations.

Similarly, the revision of the definition of prohibited discrimination in new paragraph (h) of 4 CFR 28.95 includes a list of activities that may not form the basis for employment actions. Discrimination in retaliation for

protected EEO activity became prohibited on the effective dates of the respective EEO statutes. This proposed revision codifies existing prohibitions and does not create a new cause of action.

These proposed regulations also resolve ambiguity over when retaliation claims related to discrimination on one of the EEO-protected bases, including claims of retaliation under prohibited personnel practices laws like 5 U.S.C. 2302(b)(9), must go through GAO's EEO process pursuant to GAO Order 2713.2 before a charge containing these claims can be filed with the Board's Office of General Counsel and a petition containing them can be filed with the Board. Retaliation claims related to discrimination on one of the EEO-protected bases involving a removal, a suspension of more than 14 days, or a furlough of not more than 30 days would continue to have the option, pursuant to 4 CFR 28.98(c), of filing a discrimination complaint with GAO pursuant to GAO Order 2713.2 or bypassing the EEO process and filing a charge directly with the Board's Office of General Counsel. These proposed revisions would clarify that other retaliation claims related to discrimination on one of the EEO-protected bases may also bypass GAO's EEO process if they are not related to the filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2. The Board's General Counsel would be empowered to make a determination of whether retaliation claims related

to discrimination on one of the EEO-protected bases are related to filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2. If the claims are related to the filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2, the General Counsel would inform the individual that they need to file their complaint with GAO pursuant to GAO Order 2713.2 before the Board's Office of General Counsel is permitted to process their charge on these allegations. If the General Counsel determines the claims are not related to filing or assisting with a discrimination complaint pursuant to GAO Order 2713.2, the Board's Office of General Counsel would inform the individual that the charge containing these claims can be processed by the Board's Office of General Counsel without delay. The purpose of giving this unreviewable discretion to the Board's General Counsel is to give certainty to individuals that their claims may be processed immediately by the Board's Office of General Counsel without fear of having the claims subsequently dismissed for failure to exhaust the administrative remedies contained in GAO Order 2713.2.

Finally, the proposed regulations would allow the Board's Office of General Counsel to hold in abeyance nondiscrimination allegations while related discrimination allegations are being pursued through GAO's EEO process.

Once the discrimination complaint resolution process concludes, or the individual opts out of it, both types of claims could then be investigated together. The Board's General Counsel is to utilize this provision when the claims are so related that the Board's General Counsel determines it would be most appropriate to conduct a single investigation into them. The Board's General Counsel would have discretion to revisit this decision at any time and no longer hold a claim in abeyance. For purposes of 4 CFR 28.12(g), the length of time a claim is held in abeyance would count toward the 180-day period after which a charging party may opt out of the Board's Office of General Counsel's investigation and file a petition with the Board. The Board will consider all comments received on or before the closing date for comments. The Board may change the proposed revisions based on the comments received.

#### **List of Subjects in 4 CFR Part 28**

Administrative practice and procedure, Claims, Equal employment opportunity, Government employees.

For the reasons stated in the preamble, the Government Accountability Office proposes to amend title 4, chapter I, subchapter B, part 28 of the Code of Federal Regulations as follows:

**PART 28—GOVERNMENT ACCOUNTABILITY OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING**

**EMPLOYMENT PRACTICES AT THE GOVERNMENT ACCOUNTABILITY  
OFFICE**

1. The authority citation for part 28 continues to read as follows:

**Authority:** 31 U.S.C. 753.

**PART 28 [Amended]**

2. Amend part 28 by removing the word or phrase indicated in the left column of the table from wherever it appears in the part and adding the word or phrase indicated in the right column in its place:

Remove	Add
"him or her"	"them"
"him- or herself"	"themselves"
"himself or herself	"themselves"
"his or her"	"their"
"his/her"	"their"
"he or she has"	"they have"
"he or she is"	"they are"

**§ 28.80 [Amended]**

3. Amend §28.80 by removing the words "he or she determines" in the second sentence and adding in their place the words "they determine".

4. Amend §28.95 by:

a. Revising paragraph (c);

b. In paragraph (d) removing the word "or" at the end of the paragraph; and

c. Redesignate paragraph (e) as paragraph (g); and adding a new paragraph (e) and paragraphs (f) and (h).

The revision and additions read as follows:

**§28.95 Purpose and scope.**

\* \* \* \* \*

(c) Section 6(d) of the Fair Labor Standard Act of 1938 as amended by the Equal Pay Act of 1963 (29 U.S.C. 206(d)), prohibiting discrimination in wages on the basis of sex;

\* \* \* \* \*

(e) Section 202 of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff-1), prohibiting discrimination on the basis of genetic information;

(f) Section 103 of the Pregnant Workers Fairness Act (42 U.S.C. 2000gg-1), prohibiting discrimination on the basis of pregnancy, childbirth or related medical conditions; or

\* \* \* \* \*

(h) Prohibited discrimination also includes any employment action taken against an employee or applicant for employment for opposing any unlawful employment practice, or for participating in any manner in an investigation, hearing, or in any stage of an administrative or judicial proceeding, under any of the

statutes or laws identified in paragraphs (a) through (g) of this section.

5. Amend §28.98 by:

- a. Revising paragraphs (a), (b) introductory text, (b) (1) and (2);
- b. Revising the paragraph (c) heading;
- c. Adding the words "Office of" between the words "Board's" and "General" in paragraph (c) (1);
- d. Revising the second, third, and fourth sentences of paragraph (c) (2) and revising paragraph (d);
- e. Redesignating paragraph (e) as paragraph (f) and adding a new paragraph (e); and
- f. Adding a heading to newly redesignated paragraph (f) and adding paragraph (f) (3).

The revisions and additions read as follows:

**§28.98 Individual charges in EEO cases.**

(a) *General rule for filing EEO claims.* Except as provided in paragraphs (c) and (e) of this section, an employee or applicant alleging prohibited discrimination (as defined in § 28.95) must first file a complaint with GAO in accordance with GAO Order 2713.2 and may not file directly with the Board's Office of General Counsel.

(b) *Time limits to file EEO claims with PAB/OGC.* After GAO processes a complaint in accordance with GAO Order 2713.2, an employee or applicant for employment may file an

individual EEO charge with the Board's General Counsel as follows:

(1) Within 30 days from the receipt by the charging party of a GAO decision rejecting the complaint in whole or part; or

(2) Whenever a period of more than 120 days has elapsed since the complaint was filed, and a final GAO decision has not been issued; or

\* \* \* \* \*

(c) *Special rules for adverse and performance-based actions.* \* \* \*

(2) \* \* \* If the employee elects to file a complaint of discrimination with GAO, they may still seek Board review of the matter by filing a charge with the Board's Office of General Counsel at the times authorized in paragraph (b) of this section. Where a discrimination complaint filed with GAO relates to one or more non-EEO issues that are within the Board's jurisdiction in addition to an EEO-related allegation, the subsequent charge filed with the Board's Office of General Counsel under paragraph (b) of this section shall be considered a timely appeal of the non-EEO issue(s). An employee will be deemed to have elected the EEO complaint process if they file a timely written complaint of discrimination with GAO before filing a charge with the Board's Office of General Counsel. \* \* \*

(d) *Special rules for RIF-based actions.* An individual alleging discrimination issues in connection with a RIF-based separation may follow the procedures outlined above in paragraph (c) of this section for adverse and performance-based actions, or may choose instead a third option. In accordance with the provisions of § 28.13, such an individual may challenge that action by filing directly with the PAB, thus bypassing both the Office of Opportunity and Inclusiveness and the Board's Office of General Counsel.

(e) *Special rules in certain retaliation actions.* (1) Except as outlined in paragraph (c) of this section, whenever a charging party raises a claim of retaliation that could be raised under § 28.95(h), including the prohibited personnel practices listed in 5 U.S.C. 2302(b)(9), and that claim has not already been filed pursuant to GAO Order 2713.2, the Board's General Counsel has authority to, and shall determine whether the claim relates to retaliation for filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2. The General Counsel's determination shall not be reviewable.

(i) If the General Counsel determines the claim as described in this paragraph (e)(1) relates to retaliation for filing or assisting with a discrimination complaint filed pursuant to GAO Order 2713.2, the Board's Office of

General Counsel shall instruct the charging party to file the claim as a complaint of discrimination pursuant to GAO Order 2713.2.

(ii) If the General Counsel determines the claim as described in this paragraph (e)(1) does not relate to retaliation for filing or assisting with a discrimination complaint pursuant to GAO Order 2713.2, the Board's Office of General Counsel shall investigate the claim in accordance with § 28.12.

(2) A charging party who files a claim that could be raised under § 28.95(g) may bring the retaliation claim both as a complaint of discrimination under § 28.95 and as a prohibited personnel practice under 5 U.S.C. 2302(b)(9).

(f) *Claims related to EEO matters pending with EEO.* \* \*

\*

(3) Where the Board's General Counsel concludes that one or more claims is sufficiently related to a discrimination complaint filed by the same claimant pursuant to GAO Order 2713.2 and that it would be appropriate to investigate all claims together, the Board's Office of General Counsel may hold the related claim(s) in abeyance until the Board's General Counsel receives a charge pursuant to paragraph (b) of this section with respect to the formal discrimination complaint or makes a determination that the investigation should resume.

**Julia Akins Clark,**

*Chair, Personnel Appeals Board,*

*U.S. Government Accountability Office.*

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